Andrew Chuah Khim Peik v HLG Capital Bhd (currently known as Hong Leong Capital Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-2146–10 OF 2017
HAMID SULTAN, MARY LIM AND HANIPAH FARIKULLAH JJCA
2 MAY 2019

Civil Procedure — Judicial review — Appeal against — Order of certiorari — Threshold to be satisfied by employer to resist a claim for dismissal without just cause and excuse — Whether sufficient notice given to appellant of his alleged poor performance — Whether High Court's decision to quash decision of Industrial Court justifiable — Rules of Court 2012 O 53

Labour Law — Employment — Dismissal — Appellant dismissed by respondent — Industrial Court ruled that appellant was dismissed without just cause and excuse — High Court judge quashed decision of Industrial Court — Whether High Court judge's decision to quash decision of Industrial Court justifiable — Industrial Relations Act 1967 s 20(3)

The appellant, a high-ranking employee of the respondent, appealed against the decision of the High Court judge which quashed the decision of the Industrial Court which had ruled that the appellant was dismissed without just cause and excuse. The learned High Court judge in this regard, allowed the respondent's application for judicial review against the award of the Industrial Court Award No 805 Year 2016. In brief, the appellant was appointed as Group Financial Controller of the respondent. However, on 18 June 2009 by way of a letter dated 17 June 2009, the appellant was summarily dismissed on the ground of his alleged poor performance. This was despite the fact that no written warnings or reasonable indication was given to the appellant of his alleged shortcomings. Further, despite being awarded an opportunity to produce emails as evidence of the appellant's poor performance, the respondent's main witness and the appellant's superior, Chew Seong Aun, could not produce those emails. The appellant contended that the application for judicial review should not have been allowed on the grounds that the learned Chairman's decision was not grounded on illegality or plain irrationality and thus the finding of the Industrial Court should not have been quashed. The respondent had contended that in view that the appellant was a high-ranking employee, the appellant, despite not being issued written warnings, should have known that the respondent was not satisfied with his performance. However, the appellant contended that the dissatisfaction with his performance must be obvious and/or clear enough that the appellant would

be aware of the same. This was clearly not the case as the appellant was caught completely off guard. The respondent had merely given evidence of misunderstanding on work-related matters raised by one David Lim, Muhammad Awi Goo and Mohamed Azlan bin Alias, all of who were from the Securities Division of the respondent and had grouses with the appellant. Evidence was produced by the appellant that his strictness in carrying out his job was necessary in light of the action taken against David Lim, Muhammad Awi Goo and Mohamed Azlan bin Alias by the public supervisory bodies. It must be noted that there were no official complaints filed against the appellant. The appellant's superior, Chew Seong Aun, had also failed to carry out an appraisal as per the procedure and policy of the respondent (as confirmed by Chin Jeck Leng — the respondent's HR manager). On the contrary, he had argued that he carried out the appraisal in his own way. The appellant submitted that in light of policies determined by the respondent, Chew Seong Aun's evidence that he had carried out the appraisal in his own way, could not be justified. If at all there was dissatisfaction by the respondent, the appellant would have had at the very least been made aware through the appraisal. However, this was clearly not done, and the respondent could not be allowed to contend that sufficient notice was given to the appellant of his alleged poor performance or that the appellant should have known of the dissatisfaction of the respondent with his performance. On the contrary, the appellant had received good bonuses, increments and comments for his appraisals during his probation and the final appraisal for confirmation. Based on the appellant's submission, the appellant submitted that the learned Chairman of the Industrial Court had not acted illegally or was plainly irrational and had considered all relevant evidence and principles when she decided in favour of the appellant. As such, the learned High Court judge had erred in law and in fact when Her Ladyship allowed the application for judicial review. Therefore, the appellant prayed that the appeal be allowed with costs.

Held, allowing the appeal with costs subject to allocator:

(1) It was well established that the industrial jurisprudence leaned towards the employee and the threshold to be satisfied by the employer to resist a claim for dismissal without just cause and excuse was high. It was also well established in cases of dishonesty of employee at senior management level, the threshold was low (see paras 7(a)–(b)).

(2) In case of dishonesty, it was quite straight forward when it came to dismissal. In case of poor performance, it may become very technical and many issues may have to be considered and generally may also relate to market force and economic situation, etc. In cases of poor performance by employee, holding senior management level, the threshold was hybrid in nature and depended on the facts and circumstances of the case and fell

within the realm of the Industrial Court itself to decide, taking into consideration just and equitable consideration as envisaged in the Act (see paras 7(c)–(d)).

(3) When the finding fell into the realm of the Industrial Court and the Industrial Court had taken into consideration, all the facts related to the dismissal, the High Court should be slow to intervene and quash the decision. The facts in this appeal amply meet that threshold and the High Court fell into error in intervening on quashing the decision of the Industrial Court (see para 7(e)).

(4) For reasons stated above, after having considered the memorandum of appeal of the appellant in this case, at the High Court itself and the submission of the parties before the court, the court was of the view that the decision on the Industrial Court ought not to have been disturbed (see para 8).

[Bahasa Malaysia summary

Perayu, pekerja responden yang mempunyai kedudukan tinggi, merayu kepada keputusan hakim Mahkamah Tinggi yang mengenetepikan keputusan Mahkamah Perusahaan yang memutuskan bahawa perayu telah dipecat tanpa alasan dan sebab yang adil. Hakim Mahkamah Tinggi yang terpelajar sehubungan dengan ini, membenarkan permohonan responden untuk semakan kehakiman terhadap keputusan Mahkamah Perusahaan No 805 Tahun 2016. Secara ringkasnya, perayu telah dilantik oleh *Group Financial Controller* milik responden. Walau bagaimanapun, pada 18 Jun 2009 melalui surat yang bertarikh 17 Jun 2009, perayu telah dipecat terus atas dasar prestasinya yang dikatakan buruk. Ini adalah walaupun pada hakikatnya tiada amaran-amaran bertulis atau petunjuk yang munasabah diberikan kepada perayu mengenai kelemahan-kelemahannya yang dikatakan. Selanjutnya, walaupun pada hakikatnya telah diberikan peluang untuk menunjukkan kiriman emel-emel sebagai bukti terhadap prestasi buruk perayu, saksi utama responden dan penyelia kepada perayu, Chew Seong Aun, tidak dapat menunjukkan kiriman emel-emel tersebut. Perayu mengatakan bahawa permohonan untuk semakan kehakiman tidak boleh dibenarkan atas dasar bahawa keputusan Pengerusi yang terpelajar tidak berdasarkan pada ketidaksahan atau kerenggasan biasa dan oleh itu, keputusan Mahkamah Perusahaan tidak patut diketepikan. Responden telah mengatakan bahawa memandangkan perayu adalah pekerja yang mempunyai kedudukan tinggi, perayu, walaupun pada hakikatnya tidak diberikan amaran-amaran bertulis, sepatutnya tahu bahawa responden tidak berpuas hati dengan prestasinya. Walaubagaimanapun, perayu mengatakan bahawa ketidakpuasan hati dengan prestasinya mestilah cukup jelas dan/atau terang sehingga perayu sedia maklum mengenai yang sama. Ini adalah secara terangnya bukanlah keadaan seumpamanya memandangkan perayu tidak tahu menahu mengenai perihal yang sama. Responden hanya memberikan keterangan mengenai perselisihan

faham mengenai perihal berkaitan kerja yang dibangkitkan oleh David Lim, Muhammad Awi Goo dan Mohamed Azlan bin Alias, yang mana semuanya daripada Bahagian Keselamatan responden dan mempunyai perbalahan dengan perayu. Keterangan diberikan oleh perayu bahawa ketegasan beliau dalam menjalankan kerja adalah perlu berkaitan dengan tindakan yang diambil terhadap David Lim, Muhammad Awi Goo and Mohamed Azlan bin Alias oleh badan penyeliaan awam. Ia perlu diambil maklum bahawa tiada aduan-aduan rasmi yang difailkan terhadap perayu. Penyelia kepada perayu, Chew Seong Aun, juga telah gagal menjalankan penilaian sepertimana di dalam prosedur dan polisi responden (sepertimana yang disahkan oleh Chin Jeck Leng — Pengurus Sumber Manusia responden). Sebaliknya, beliau berhujah bahawa penilaian telah dijalankan mengikut caranya sendiri. Perayu menghujahkan bahawa berkenaan dengan polisi-polisi yang ditentukan oleh responden, keterangan Chew Seong Aun bahawa beliau telah menjalankan penilaian mengikut caranya sendiri adalah tidak wajar. Jikalau adapun ketidakpuasaan hati oleh responden, perayu sekurang-kurangnya mestilah sedia maklum mengenai penilaiannya. Walau bagaimanapun, ini dengan terang tidak dilakukan, dan responden tidak boleh dibenarkan untuk mengatakan bahawa notis yang cukup telah diberikan kepada perayu mengenai prestasi buruknya atau bahawa perayu sepatutnya tahu mengenai ketidakpuasaan hati responden mengenai prestasinya. Sebaliknya, perayu telah diberikan bonus-bonus yang bagus, kenaikan gaji dan komen mengenai penilaiannya semasa dalam tempoh percubaan dan penilaian terakhir untuk pengesahan. Berdasarkan hujahan perayu, perayu menghujahkan bahawa Pengerusi Mahkamah Perusahaan yang terpelajar tidak bertindak dalam ketidaksahan atau kerenggasan biasa dan telah mempertimbangkan semua keterangan yang relevan dan principal apabila beliau memberikan keputusan berpihak kepada perayu. Oleh itu, hakim Mahkamah Tinggi yang terpelajar telah terkhilaf dalam undang-undang dan fakta apabila beliau membenarkan permohonan semakan kehakiman. Oleh itu, perayu meminta bahawa rayuannya dibenarkan dengan kos.

Diputuskan, membenarkan rayuan dengan kos tertakluk kepada alokatur:

(1) Ia telah diputuskan bahawa perundangan perusahaan memihak kepada pekerja dan tahap untuk dipenuhi oleh majikan untuk menolak tuntutan pemecatan tanpa alasan dan sebab yang adil adalah tinggi. Ia juga telah diputuskan bahawa kes-kes mengenai ketidakjujuran pekerja pada tahap pengurusan kanan, tahapnya adalah rendah (lihat perenggan 7(a)–(b)).

(2) Di dalam kes ketidakjujuran, ia adalah agak telus apabila melibatkan pemecatan. Di dalam kes mengenai prestasi buruk, ia mungkin teknikal dan banyak isu-isu yang harus dipertimbangkan dan secara keseluruhannya mungkin juga berkaitan dengan kuasa pasaran dan situasi ekonomi, dll. Di dalam kes-kes mengenai prestasi buruk pekerja, yang memegang jawatan tahap pengurusan kanan, tahapnya adalah

hybrid secara semulajadinya dan bergantung kepada fakta-fakta dan keadaan kes dan jatuh dibawah kuasa Mahkamah Perusahaan sendiri untuk memutuskannya, mengambil kira pertimbangan adil dan saksama seperti yang digambarkan dalam Akta (lihat perenggan 7(c)–(d)).

(3) Apabila keputusan tertakluk kepada Mahkamah Perusahaan dan Mahkamah Perusahaan telah mengambil kira, semua fakta berkaitan dengan pemecatan, Mahkamah Tinggi sepatutnya berwaspada dalam campur tangan dan mengenetepikan keputusan. Fakta-fakta dalam rayuan ini cukup untuk memenuhi tahap dan Mahkamah Tinggi telah terkhilaf dalam memasuk campur dan mengenetepikan keputusan Mahkamah Perusahaan (lihat perenggan 7(e)).

(4) Untuk sebab-sebab yang dinyatakan di atas, selepas mempertimbangkan memorandum rayuan perayu dalam kes ini, di Mahkamah Tinggi sendiri dan hujahan pihak-pihak di mahkamah, mahkamah berpendapat bahawa keputusan Mahkamah Perusahaan tidak sepatutnya diganggu (lihat perenggan 8).]

Notes

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1178–1258.

Cases referred to

Alidair Ltd v Taylor [1978] ICR 445 (refd)

Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 MLJ 361; [1999] 4 CLJ 155, CA (refd)

Bennett Subash Peter v Bon Ton Sdn Bhd (Bon Ton Resort Langkawi) [2019] 1 MLJ 326, CA (refd)

Burswood Resort (Management) Limited v Yeap Peng Huat [2007] 2 LNS 2222, IC (refd)

Calvin v Carr and others [1979] 2 All ER 440 (refd)

Chapman and others v Goonvean & Rostowrack China Clay Co Ltd [1973] 2 All ER 1063, CA (refd)

Choong Poh Ling v CIMB Aviva Insurance Berhad [2016] 2 LNS 1032, IC (refd)

Cox v Philips Industries Ltd [1976] 3 All ER 161; [1976] 1 WLR 638, QBD (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417; [1991] 2 CLJ 881, SC (refd)

Hewlett Packard (M) Sdn Bhd v Loh Choon Aim [1993] 1 ILR 308B (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369; [1996] 4 CLJ 687, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996]

1 MLJ 481; [1996] 1 MELR 142, CA (refd)
Ireka Construction Bhd v Chantiravathan Subramaniam James [1995] 2 ILR 11 (refd)
James v Waltham Holy Cross Urban District Council [1973] ICR 398 (refd)
K Kanagam Alp Kannoo v Sime Darby Plantation Bhd/Ladang Bukit Pilah [2018] ILJU 110; [2018] 2 LNS 1567, IC (refd)
Lam Yue Choong v F&N Dairies (M) Sdn Bhd [2005] 2 LNS 1832, IC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
MCI WorldCom Malaysia Sdn Bhd v Sultan Askin Mydin Meera [2007] 2 LNS 2267, IC (refd)
Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204, SC (refd)
Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, HC (refd)
Noor Azarina binti Alias v Serasi Medik Sdn Bhd [2018] ILJU 153; [2018] 2 LNS 1776, IC (refd)
Omni Precision Sdn Bhd v Tan Boon Leong [2006] 2 LNS 0922, IC (refd)
Pearce v Foster and Others [1886–90] All ER Rep Ext 1752, CA (refd)
Peter David Jackson v AON Insurance Brokers (M) Sdn Bhd (R2–25–77–05 of 2015) (unreported) (refd)
Peter David Jackson v AON Insurance Brokers (M) Sdn Bhd (08–225–05 of 2017) (unreported) (refd)
Peter David Jackson v AON Insurance Brokers (M) Sdn Bhd [2015] 2 LNS 1567 (refd)
Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Premkumar Vijayakumaran v UMW Toyota Motor Sdn Bhd [2018] 2 LNS 2124, IC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Razali bin Husain v Sapura Research Sdn Bhd & Anor [2016] MLJU 1433; [2016] MLRHU 1465, HC (refd)
Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor [2007] 1 MELR 13 (refd)
Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor [2000] 1 MLJ 107; [2000] 1 CLJ 180, HC (refd)
Roslan Baba v Puncak Niaga (M) Sdn Bhd [2013] 3 ILR 216 (refd)
Shanmugam a/l Maramuthu v A Hartrodt Ocean Services (M) Sdn Bhd [2018] ILJU 152; [2018] 4 ILR 106, IC (refd)
Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba [1998] 2 MLJ 372; [1998] 3 CLJ 288, CA (refd)
Tan Cheng Leng v Tropicana Medical Centre (M) Sdn Bhd [2017] ILJU 16; [2017] 1 ILR 383, CA (refd)

A *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)
United Plantations Bhd v Ahmad Zaini B Mohamed Tahir [1996] 1 ILR 632 (refd)
Waite v Government Communications Headquarters [1983] 2 All ER 1013;
B [1983] ICR 653; [1983] IRLR 341, HL (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1988] 1 CLJ 45, SC (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753, FC (refd)
C

Appeal from: Judicial Review No WA-25–175–10 of 2016 (High Court, Kuala Lumpur)

Balan S Nair (Elaina Teng Xue Er with him) (Seah Balan Ravi & Co) for the
D *appellant.*
Sivabalan Nadarajah (Reena Enbasegaram with him) (Shearn Delamore & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):
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[1] The appellant, a high ranking employee of the respondent, appeals against the decision of the High Court judge which quashed the decision of the industrial court which had ruled that the appellant was dismissed without just
F cause and excuse.

[2] The appellant and the respondent relied on the following cases:

(i) *Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor* [2007] 1 MELR 13 (CA);

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(ii) *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC);

(iii) *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1996] 1 MELR 142;

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(iv) *Menara Panglobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501;

(v) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147;

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(vi) *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629;

(vii) *Razali bin Husain v Sapura Research Sdn Bhd & Anor* [2016] MLJU 1433; [2016] MLRHU 1465;

(viii) *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625;

(ix) *Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor* [2000] 1 MLJ 107; [2000] 1 CLJ 180;

(x) *James v Waltham Holy Cross Urban District Council* [1973] ICR 398;

(xi) *Ireka Construction Bhd v Chantiravathan Subramaniam James* [1995] 2 ILR 11;

(xii) *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1988] 1 CLJ 45;

(xiii) *Cox v Philips Industries Ltd* [1976] 3 All ER 161; [1976] 1 WLR 638;

(xiv) *Calvin v Carr and others* [1979] 2 All ER 440;

(xv) *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361; [1999] 4 CLJ 155;

(xvi) *Chapman and others v Goonvean & Rostowrack China Clay Co Ltd* [1973] 2 All ER 1063;

(xvii) *Pearce v Foster and Others* [1886–90] All ER Rep Ext 1752;

(xviii) *Premkumar Vijayakumaran v UMW Toyota Motor Sdn Bhd* [2018] 2 LNS 2124;

(xix) *Noor Azarina binti Alias v Serasi Medik Sdn Bhd* [2018] ILJU 153; [2018] 2 LNS 1776;

(xx) *Shanmugam a/l Maramuthu v A Hartrodt Ocean Services (M) Sdn Bhd* [2018] ILJU 152; [2018] 4 ILR 106;

(xxi) *K Kanagam Alp Kannoo v Sime Darby Plantation Bhd/Ladang Bukit Pilah* [2018] ILJU 110; [2018] 2 LNS 1567;

(xxii) *Peter David Jackson v AON Insurance Brokers (M) Sdn Bhd* [2015] 2 LNS 1567;

(xxiii) *Waite v Government Communications Headquarters* [1983] 2 All ER 1013; [1983] IRLR 341;

(xxiv) *Waite v Government Communications Headquarters* [1983] 2 All ER 1013; [1983] ICR 653;

(xxv) *Peter David Jackson v AON Insurance Brokers (M) Sdn* (R2–25–77–05 of 2015) (unreported);

(xxvi) *Peter David Jackson v AON Insurance Brokers (M) Sdn Bhd* (08–225–05 of 2017) (unreported) (FC);

(xxvii) *Hewlett Packard (M) Sdn Bhd v Loh Choon Aim* [1993] 1 ILR 308B;

(xxviii) *United Plantations Bhd v Ahmad Zaini B Mohamed Tahir* [1996] 1 ILR 632;

(xxix) *Alidair Ltd v Taylor* [1978] ICR 445;

(xxx) *Choong Poh Ling v CIMB Aviva Insurance Berhad* [2016] 2 LNS 1032;

(xxxi) *Tan Cheng Leng v Tropicana Medical Centre (M) Sdn Bhd* [2017] ILJU 16; [2017] 1 ILR 383;

(xxxii) *MCI WorldCom Malaysia Sdn Bhd v Sultan Askin Mydin Meera* [2007] 2 LNS 2267;

(xxxiii) *Burswood Resort (Management) Limited v Yeap Peng Huat* [2007] 2 LNS 2222;

(xxxiv) *Lam Yue Choong v F&N Dairies (M) Sdn Bhd* [2005] 2 LNS 1832;

(xxxv) *Roslan Baba v Puncak Niaga (M) Sdn Bhd* [2013] 3 ILR 216;

(xxxvi) *Omni Precision Sdn Bhd v Tan Boon Leong* [2006] 2 LNS 0922;

(xxxvii) *Robert John Reeves v Menteri Sumber Manusia, Malaysia & Anor* [2000] 1 MLJ 107; [2000] 1 CLJ 180;

(xxxviii) *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314;

(xxxix) *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288;

(xl) *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417; [1991] 2 CLJ 881;

(xli) *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204;

(xlii) *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753; and

(xliii) *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687.

BRIEF FACTS AND GROUNDS OF DECISION

[3] The brief facts of the case and the grounds of decision placed in a rudimentary manner is repeated to save court's time and it reads as follows:

Brief facts:

1. The defendant/appellant/D1 was the Group Financial Controller of the plaintiff/respondent/P1. D1's employment with P1 was confirmed on 31 July 2006.

2. P1 claimed that: D1's performance deteriorated over the subsequent years. D1 has poor leadership skills and lack of competency and integrity. In 2009, P1 no longer repose the necessary trust to D1 and terminated D1 via letter dated 17 June 2009 for immediate termination.

3. D1 then filed an action against P1 in the Industrial Court/IC. IC held that D1's termination was without just cause or excuse and ordered P1 to pay D1 RM314,145.52. Dissatisfied, P1 filed this judicial review for an order for certiorari to quash IC's decision. No warning was given to D1. No opportunity was given for D1 to improve. No formal assessment of employee was conducted.

4. IC had erred in law or acted outside its jurisdiction by applying the wrong test/legal principles, by failing to take relevant matters into consideration, by taking into account irrelevant matters and by arriving at unreasonable/perverse decision. Since D1 was employed by P1, D1 had not been subjected to any appraisal except those carried out for purpose of D1's confirmation. D1 has been counseled several times by the Human Resources. No bonus given to D1 in 2007 should reflect P1's dissatisfaction with D1's performance.

5. P1 prayed for an order of Certiorari to quash IC's award. Costs and other suitable relief.

6. D1 stated that: the increment and bonuses were not given despite no appraisal being conducted. No complaint received that D1 had bad leadership skills and lack of competency and integrity. This claim was not proven before IC. D1 had a problem with his 2 superiors because D1 refused to heed to their request for certain payments which were not in compliance with P1's Financial Instruction. IC even found that there was absolutely no evidence of D1's poor performance. P1 as a bank should have complied with the procedures issued by the Securities Commission and Bank Negara Malaysia.

7. The letter of termination was the first notice given to D1 on the dissatisfaction of D1's performance without any show cause letter or warning or reprimand of any sort or even a counselling session. The letter of termination came as a huge surprise to D1. D1 was not given any opportunity to answer the charges as there was no domestic inquiry done at all. IC had not erred in coming to its decision. This judicial review is an appeal in disguise. All these issues have been canvassed before IC.

8. High Court: P1's OS for judicial review is allowed with costs of RM5,000.

Grounds of Decision of High Court (YA DATUK HJH AZIZAH BT HJ NAWAWI)

1. The HCJ found that the Industrial Court had applied the wrong test in this case. The Industrial Court had applied the general test to prove poor performance of the employees.

2. The HCJ found that the Industrial Court has made an error in law in applying the general test to a senior management employee. The test to be applied is that it is sufficient for the company to establish that the upper management of the company, in the absence of bad faith, was dissatisfied with employee in question and that the same had been brought to his attention.

3. The HCJ found that the Industrial Court has failed to take into consideration the evidence of the company's witnesses, that the company's top management had lost confidence in the respondent to continue to lead the financial aspect of the group.

4. The HCJ held that the Industrial Court's finding is against the evidence before the Industrial Court that the company's dissatisfaction with the respondent is bona fide.

5. The HCJ found that the Industrial Court had failed to take relevant considerations and had reached a decision that is perverse, which justifies the quashing of the award.

[4] The memorandum of appeal of the appellant reads as follows:

1. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila membuat keputusan untuk membenarkan rayuan Pemohon dengan kos;

2. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal untuk membuat penilaian yang terperinci secara sepenuhnya terhadap afidavit-afidavit dan keterangan yang difailkan oleh Responden.

3. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira keterangan yang relevan.

4. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila mengambil kira keterangan yang tidak relevan.

5. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa terdapat prosedur dalaman yang tertentu yang patut diikuti bagi penilaian ('appraisal') Perayu yang tidak dipatuhi oleh Responden.

6. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa Perayu tidak diberi apa-apa amaran secara bertulis dan/atau lisan berkenaan dengan prestasinya.

7. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa kegagalan Responden untuk memberi bonus dan/atau kenaikan gaji tidak mencukupi untuk

menunjukkan bahawa Perayu tidak berpuas hati dengan prestasi Perayu dalam keadaan ('in the circumstances'). A

8. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila memutuskan bahawa Presiden Mahkamah Perusahaan telah khilaf dalam keputusannya. B

[5] The appellant's executive summary reads as follows:

1. The Appellant is appealing against the decision of the learned High Court judge, Yang Arif Datin Hajjah Azizah binti Nawawi, in allowing the Respondent's application for judicial review against the Award of the Industrial Court Award No: 805 Tahun 2016. C

2. In brief, the Appellant was appointed as Group Financial Controller of the Respondent. However, on 18.06.2009 by way of a letter dated 17.06.2009, the Appellant was summarily dismissed on the ground of his alleged poor performance. This was despite the fact that no written warnings or reasonable indication was given to the Appellant of his alleged shortcomings. D

3. Further, despite being awarded an opportunity to produce emails as evidence of the Appellant's poor performance, the Respondent's main witness and the Appellant's superior, Chew Seong Aun, could not produce those emails. E

4. The Appellant contends that the application for judicial review should not have been allowed on the grounds that the learned Chairman's decision was not grounded on illegality or plain irrationality and thus the finding of the Industrial Court should not have been quashed. F

5. The Respondent had contended that in view that the Appellant was a high ranking employee, the Appellant, despite not being issued written warnings, should have known that the Respondent was not satisfied with his performance. However, the Appellant contends that the dissatisfaction with his performance must be obvious and/or clear enough that the Appellant would be aware of the same. This was clearly not the case as the Appellant was caught completely off guard. G

6. The Respondent had merely given evidence of misunderstandings on work-related matters raised by one David Lim, Muhammad Awi Goo and Mohamed Azlan bin Alias, all of who were from the Securities Division of the Respondent and had grouses with the Appellant. Evidence was produced by the Appellant that his strictness in carrying out his job was necessary in light of the action taken against David Lim, Muhammad Awi Goo and Mohamed Azlan bin Alias by the public supervisory bodies. It must be noted that there were no official complaints filed against the Appellant. H I

7. The Appellant's superior, Chew Seong Aun, had also failed to carry out an appraisal as per the procedure and policy of the Respondent (as confirmed by Chin Jeck Leng — the Respondent's HR Manager). On the contrary,

A he had argued that he carried out the appraisal in his own way. The Appellant submits that in light of policies determined by the Respondent, Chew Seong Aun's evidence that he had carried out the appraisal in his own way, cannot be justified.

B 8. If at all there was dissatisfaction by the Respondent, the Appellant would have had at the very least been made aware through the appraisal. However, this was clearly not done and the Respondent cannot be allowed to contend that sufficient notice was given to the Appellant of his alleged poor performance or that the Appellant should have known of the dissatisfaction of the Respondent with his performance.

C 9. On the contrary, the Appellant had received good bonuses, increments and comments for his appraisals during his probation and the final appraisal for confirmation.

D 10. Based on the Appellant's submission, the Appellant submits that the learned Chairman of the Industrial Court had not acted illegally or was plainly irrational and had considered all relevant evidence and principles when she decided in favour of the Appellant. As such the learned High Court judge erred in law and in fact when Her Ladyship allowed the application for judicial review.

E 11. Therefore, the Appellant prays that the appeal be allowed with costs.

[6] The respondent's memorandum of appeal in the High Court reads as follows:

F 3. Alasan-alasan yang mana relief tersebut dipohon telah dinyatakan sepenuhnya dalam Afidavit Lim Man Hou yang diikrarkan pada 5.10.2016 untuk menyokong Permohonan Untuk Semakan Kehakiman berhubung dengannya yang mana Pernyataan ini difailkan tetapi alasan-alasan itu dengan ringkasnya adalah bahawa:

G 3.1. Mahkamah Perusahaan telah melakukan kesilapan undang-undang yang material berikut dan/atau bertindak di luar bidang kuasanya apabila memutuskan yang penamatan perkhidmatan Responden atas sebab prestasi yang lemah, adalah tanpa sebab atau alasan yang munasabah, kerana Mahkamah Perusahaan telah,

H (a) menerapkan ujian yang salah/salah menerapkan prinsip undang-undang;

(b) gagal mengambil kira perkara relevan;

(c) mengambil kira perkara tidak relevan; dan

I (d) mencapai keputusan yang begitu bertentangan dan tidak munasabah hinggakan tiada tribunal yang munasabah dalam keadaan yang sama akan mencapai keputusan demikian.

3.2. Mahkamah Perusahaan terkhilaf dari awal lagi ('from the outset') apabila Mahkamah Perusahaan gagal menerapkan pertimbangan relevan berikut apabila menentukan sama ada penamatan perkhidmatan atas alasan prestasi yang lemah

adalah dengan sebab atau alasan yang munasabah, A

(a) sama ada majikan tidak berpuas hati dengan prestasi pekerja;

(b) sama ada keterangan telah dikemukakan unluk membuktikan perasaan tidak puas hati majikan;

(c) bahawa Mahkamah Perusahaan tidak boleh menggantikan pandangan/penilaian subjektif majikan dengan dapatannya sendiri; B

(d) bahawa berhubung dengan pekerja berjawatan tinggi, cukuplah jika majikan membuktikan bahawa pihak pengurusan kanan — tanpa niat jahat — tidak berpuas hati dengan pekerja dan bahawa perkara ini telah dibawa kepada perhatiannya. Amaran bertulis tidak perlu bagi pekerja berjawatan tinggi; C

(e) sama ada majikan telah memberi peluang kepada pekerja untuk membaiki prestasinya.

3.3. Mahkamah Perusahaan terkhilaf dari segi undang-undang apabila terlalu menitikberatkan tentang sama ada penilaian rasmi telah dijalankan. D

3.4. Mahkamah Perusahaan terkhilaf di sisi undang-undang apabila bergantung kepada ketiadaan penilaian prestasi untuk memutuskan bahawa penamatan perkhidmatan Responden adalah tidak adil, dan dengan berbuat demikian, telah gagal mengambil kira faktor-faktor relevan berikut, E

(a) kewajipannya untuk menerapkan Seksyen 30(5) Akta Perhubungan Perusahaan 1967 yang dengan nyata memperuntukkan bahawa Mahkamah Perusahaan hendaklah, 'act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'. F

(b) tidak ada obligasi undang-undang atau statutori yang dikenakan terhadap majikan untuk menjalankan penilaian rasmi terhadap pekerjanya.

(c) matlamat untuk mengadakan penilaian rasmi adalah untuk menentukan bonus dan/atau kenaikan gaji untuk diberikan kepada pekerja yang berkenaan. G

(d) peranan Mahkamah Perusahaan adalah untuk membuat keputusannya berdasarkan keterangan lisan dan/atau berdokumen yang dikemukakan di hadapannya, serta untuk menentukan pertimbangan yang perlu diberikan kepada apa-apa keterangan dan sama ada untuk menerimanya atau mengenepikannya. H

(e) meskipun jika terdapat keperluan di pihak majikan untuk mengadakan penilaian, kegagalan majikan untuk berbuat demikian tidak mungkin menyebabkan pembuangan kerja yang sebaliknya adil, menjadi tidak adil. Apa-apa kecacatan atau pelanggaran keadilan asasi di pihak majikan boleh diubati oleh Mahkamah Perusahaan dengan mendengar perkara tersebut *de novo.* I

3.5. Mahkamah Perusahaan melakukan kesilapan undang-undang apabila

mencapai kesimpulan bahawa penilaian dikatakan perlu untuk menilai prestasi Responden, apabila,

(a) gagal mengambilkira perkara relevan keterangan yang tidak dipertikaikan bahawa sepanjang tempoh pekerjaannya dengan Pemohon, Responden tidak menjalani sebarang penilaian, kecuali yang dilakukan bagi tujuan pengesahan pekerjaannya.

(b) gagal mengambilkira perkara relevan keterangan Chew Seong Aun (dirujuk sebagai COW1 semasa presiding di hadapan Mahkamah Perusahaan dan yang pernyataan saksinya ditanda sebagai 'COWS-1'), iaitu pegawai atasan terdekat Responden, bahawa Pemohon tidak mempunyai dasar yang menghendaki penilaian rasmi dijalankan berhubung dengan pengurusan kanannya. Chew Seong Aun tersebut adalah Ketua Pegawai Kewangan Hong Leong Financial Group Berhad yang mana Pemohon adalah anak syarikatnya.

(c) mengambil kira penegasan tidak relevan oleh Chin Jeck Leng, yang memegang jawatan yang jauh lebih rendah (jika dibandingkan dengan jawatan dan gred Responden dan struktur gred kumpulan syarikat Hong Leong secara keseluruhan), yang hanya mula bekerja dengan Pemohon pada bulan April 2007, dan yang tidak terlibat dalam penilaian pekerja berjawatan tinggi termasuk Responden.

3.6. Mahkamah Perusahaan melakukan kesilapan undang-undang apabila mencapai kesimpulan di muka surat 14 dan 15 Award tersebut, bahawa, '... the idea that the Claimant was a poor performer was not one seen and experienced by COW1 on a first hand basis. Instead he had also listened to rumours, i.e. what the Claimant's peers and subordinates said to him about the Claimant, and what a few senior managers had complained to him. At most the charges against the Claimant were made as an afterthought because of such complaints by a few senior management people (mentioned in detail hereafter) and their obvious dislike of the Claimant for the manner in which he carried out his tasks as the Group Financial Controller. ... COW 1 relied on what was told to him by others ...', dan di muka surat 19 Award tersebut, bahawa, 'Even if we looked at the letter of termination ... the reasons given for the Claimant's dismissal, do not bear out to be substantive reasons at all. There were worded in such general and vague terms that no reasonable employee placed in the same position as the Claimant could have understood and replied to them', kerana gagal:

(a) menghayati secara kehakiman unsur subjektif apabila menilai prestasi pekerja dan prerogative majikan dalam hal ini.

(b) mengambil kira faktor relevan bahawa keterangan dokumentari dan juga lisan telah dikcmukakan mengenai pelbagai contoh kelemahan Responden sebagai Pengawal Kewangan Kumpulan, dari segi kemahiran pengurusan insannya semasa berurusan dengan orang bawahannya dan dari segi ketidakcekapannya dan ketiadaan kerjasama apabila berurusan dengan rakan sejawatnya dan jabatan lain.

(c) mengambil kira bahawa semasa pemeriksaan balasnya, Chew Seong Aun telah mengesahkan, 'At the end of the day, I'm aware of his output and I would judge it myself'.

(d) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen yang dikemukakan oleh Chew Seong Aun mengenai perasaan tidak puas hatinya dengan prestasi Responden sebagai Pengawal Kewangan Kumpulan.

(e) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen yang dikemukakan oleh Muhammad Awi Goo (Ketua Operasi Syarikat pada masa itu yang dirujuk sebagai 'COW-2' semasa prosiding di hadapan Mahkamah Perusahaan dan yang pernyataan saksinya ditanda sebagai 'COWS-2'), mengenai ketidakupayaan Responden untuk memahami sistem perakaunan dan operasi, menyediakan penyelesaian dan menyelesaikan masalah.

(f) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen oleh Low Fei Fei (Pengurus Kewangan Syarikat pada masa itu yang dirujuk sebagai 'COW-3' semasa prosiding di hadapan Mahkamah Perusahaan dan yang pemyataan saksinya ditanda sebagai 'COWS-3'), berkenaan Responden tidak mempunyai kemahiran pengurusan insan dan kepimpinan.

(g) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen yang dikemukakan oleh Mohammad Azlan bin Alias (Ketua Urus Niaga, Gred M1 pada masa itu yang dirujuk sebagai 'COW-4' semasa prosiding di hadapan Mahkamah Perusahaan dan yang pernyataan saksinya ditanda sebagai 'COWS-4'), mengenai Rcsponden tidak bekerjasama dan tidak berupaya memberi sokongan kepada rakan sejawatnya/jabatan lain.

(h) mengambil kira/tidak mengendahkan keterangan dokumentari oleh David Lim Meng Hoe (Ketua Pegawai Operasi HLG Securities Sdn Bhd pada masa itu) yang menghuraikan kekecewaannya ('frustration') apabila berurusan dengan Responden.

3.7. Mahkamah Perusahaan terkhilaf dari segi undang-undang apabila menyimpang daripada prinsip yang sudah mantap bahawa amaran bertulis tidak perlu bagi kakitangan berjawatan tinggi, apabila membuat kesimpulan di muka surat 17, 18 dan 19 Award tersebut, bahawa, 'The law with regard to proof that proper procedures must be followed in cases of poor performance, and where there must be sufficient written communications to the claimant on it established and very clear in its requirements'.

3.8. Mahkamah Perusahaan terkhilaf disisi undang-undang apabila membuat kesimpulan yang kelemahan Responden tidak dimaklumkan kepadanya kerana Mahkamah Perusahaan gagal mengambil kira faktor-faktor relevan berikut,

(a) keterangan Chew Seong Aun bahawa dia telah beberapa kali memberi kaunseling kepada Responden sama ada dengan sendiri dan juga dengan kakitangan daripada Sumber Manusia.

(b) e-mel Responden sendiri bertarikh 15.12.2008 bahawa dia tidak menerima apa-apa bonus dan mengakui, 'Seong Aun called me in for meeting thereafter on the EPF issue and at the same time further accused me of not being able to get along with Teo and Fei Fei ...'.

(c) surat bonus/kenaikan gaji bertarikh 14.12.2007 di mana kenaikan gaji Responden hanyalah 3.6%, iaitu lebih rendah daripada kadar kenaikan gaji purata sebanyak 4.8%, dan Responden hanya diberikan bonus 3 bulan iaitu lebih rendah daripada pembayaran bonus purata sebanyak 6.5 bulan, mencerminkan perasaan tidak puas hati Pemohon dengan Responden, yang sepatutnya disedari oleh Responden.

(d) Responden memang mengetahui tentang perasaan tidak puas hati Pemohon memandangkan surat bonus/kenaikan gaji bertarikh 15.12.2008 yang memaklumkan Responden bahawa dia tidak akan menerima sebarang bonus dan sebarang kenaikan gaji untuk tahun 2009.

4. Pada pendengaran Permohonan untuk Semakan Kehakiman, Pemohon akan bergantung kepada alasan-alasan yang dinyatakan dengan panjang lebar dalam Afidavit LIM MUN HOU yang diikrarkan pada 5.10.2016 dan difailkan di sini untuk menyokongnya.

[7] We have read the appeal records and the able submissions of the parties. We have taken some time to consider the authorities by the parties. After much consideration, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) it is well established that the industrial jurisprudence leans towards the employee and the threshold to be satisfied by the employer to resist a claim for dismissal without just cause and excuse is high. In *Bennett Subash Peter v Bon Ton Sdn Bhd (Bon Ton Resort Langkawi)* [2019] 1 MLJ 326, the Court of Appeal, inter alia, observed:

> [8] The concept of reasonableness flows through in all cases of judicial review. The test to succeed on reasonableness is high. For the appellate court to dwell on the issue of reasonableness, the applicant must demonstrate the decision of the inferior tribunal was so outrageous and it was also in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question would have arrived at that conclusion (see *Md Nor bin Kassim v Malayan Banking Bhd* [2017] 4 MLJ 71). *Thus, the test to intervene in the decision of a tribunal is extremely high when it is contrasted to the decision of a trial court in civil cases.* (Emphasis added).

(b) it is also well established in cases of dishonesty of employee at senior management level, the threshold is low;

(c) in case of dishonesty, it is quite straight forward when it comes to dismissal. In case of poor performance, it may become very technical and

many issues may have to be considered and generally may also relate to market force and economic situation, etc;

(d) in cases of poor performance by employee, holding senior management level, the threshold is hybrid in nature and depends on the facts and circumstances of the case and falls within the realm of the Industrial Court itself to decide, taking into consideration just and equitable consideration as envisaged in the Act; and

(e) ehen the finding falls into the realm of the Industrial Court and the Industrial Court had taken into consideration, all the facts related to the dismissal, the High Court should be slow to intervene and quash the decision. The facts in this appeal amply meet that threshold and the High Court fell into error in intervening on quashing the decision of the Industrial Court.

[8] For reasons stated above, after having considered the memorandum of appeal of the appellant in this case, at the High Court itself and the submission of the parties before us, we take the view that the decision of the Industrial Court ought not to have been disturbed.

[9] For reasons stated above, the appeal is allowed with costs subject to allocator. The decision of the High Court judge is set aside. The decision of the Industrial Court is sustained.

Appeal allowed with costs subject to allocator.

Reported by Addibah Adnan